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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1154

BANQUE DE FRANCE,

Petitioner-Appellant

For an Order of Restraint

against

THE SUPREME COURT OF THE STATE OF NEW YORK, HON. FELIX C. BENVENGA, INDIVIDUALLY AND AS ONE OF THE JUSTICES THEREOF, AND DANIEL DE GORTER AND HENRI WILD, AS ASSIGNEES OF BANQUE NATIONALE DE BELGIQUE,

Respondents-Appellees.

STATEMENT OF BASIS ON WHICH APPELLANT CONTENDS THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT APPEALED FROM, AS REQUIRED BY UNITED STATES SUPREME COURT RULE 12.

Pursuant to United States Supreme Court Rule 12, Paragraph 1, Banque de France, the above named appellant, presents this, its statement showing the basis on which

said appellant contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is Judicial Code, Section 237, amended (Section 344 of Title 28 of the United States Code Annotated), which provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court on a writ of error.

II. The statute of the State, the validity of which is involved, is Section 224 of the General Corporation Law of the State of New York (Section 224, L. 1909, ch. 28), which provides:

> "An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action."

III. The judgment sought to be reviewed is dated March 5th, 1942, and appellant's petition for appeal was presented to and allowed by Hon. Irving Lehman, the Chief Judge of the Court of Appeals of the State of New York, on the 7th day of March, 1942.

IV. Banque de France claims that under Article 1, Section 8, Clause 3 of the Constitution of the United States, it is immune from suit in the courts of the State of New York, because it is a foreign corporation incorporated under the laws of France, which does not maintain any office or place of business, or transact any business in the

State of New York, and that the courts of the State of New York are without jurisdiction of an action upon a contract which was made and to be performed in France, and which is wholly unrelated to the State of New York.

Banque de France further claims that insofar as Section 224 of the General Corporation Law of the State of New York purports to give to the courts of the State of New York the power to entertain or exercise jurisdiction of such action, it is unconstitutional and void.

The validity of Section 224 of the General Corporation Law of the State of New York has been upheld in this proceeding by the Court of Appeals of the State of New York, said court being the highest court of the State of New York (Opinion, Lehman, Ch. J. annexed).

V. The questions presented upon this appeal are as follows:

(1) Do the provisions of Article 1, Section 8, Clause 3 of the United States Constitution render unconstitutional and void the provisions of Section 224 of the General Corporation Law of the State of New York, as applied to an action which arose outside the State of New York, upon a contract made and to be performed in France, which is wholly unrelated to the State of New York, between two corporations engaged in interstate and foreign commerce which do not maintain any office or place of business, or transact any business in the State of New York?

(2) Are the principles of immunity under the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3), as applied in *Davis* v. *Farmers' Cooperative Equity Co.*, 262 U. S. 312; *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284; *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511; *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492; *Ball* v. *Canadian Pacific Steamships, Ltd.*, 276 N.

Y. 650, and *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379, (certiorari denied 298 U. S. 675) applicable only in favor of corporate common carriers, or do they extend equally to all other foreign corporations engaged in interstate or foreign commerce?

(3) Are the principles of immunity under the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3), as applied in *Davis* v. *Farmers' Cooperative Equity Co.*, 262 U. S. 312; *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284; *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511; *Atchison, T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101; *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492; *Ball* v. *Canadian Pacific Steamships, Ltd.*, 276 N. Y. 650, and *Matter of Baltimore Mail S. S. Co.* v. *Fawcett*, 269 N. Y. 379 (certiorari denied 298 U. S. 675) applicable only in favor of a foreign corporation defendant engaged in interstate and foreign commerce, otherwise entitled to such immunity, in a situation wherein there is another forum, apart from the local forum, available equally to both parties to the litigation?

VI. The facts upon which this case is founded, and the grounds upon which it is contended by appellant that the questions involved herein are substantial, are as follows:

Banque de France is a foreign banking corporation, and is the central bank of issue of France. It is also a commercial bank engaged in interstate and foreign commerce throughout the world. Between November 1939 and May 1940, Banque Nationale de Belgique, the central bank of issue of Belgium, delivered to Banque de France, at Paris, France, for safekeeping, certain cases said to contain gold of the value of in excess of two hundred and twenty-eight million dollars. In February 1940 a written contract, stating the obligations of the parties regarding the safekeep-

ing of the said cases said to contain gold, having been prepared in France, was forwarded to Brussels, Belgium, for signature, where it was signed. Said contract was then delivered to Banque de France, at Paris, France. Said cases, alleged to contain gold, were in the custody or control of Banque de France at the time of the German invasion, and for reasons which it is not here important to discuss, have not been redelivered to Banque Nationale de Belgique.

On March 14th, 1941, a single exiled director of Banque Nationale de Belgique, acting at London, England, purported to assign to Messrs. Daniel de Gorter and Henri Wild, residents of the State of New York, the claim of Banque Nationale de Belgique against Banque de France, arising out of the alleged breach of contract and conversion of said gold in France. On April 23rd, 1941, said alleged assignees instituted an action in the Supreme Court of the State of New York to recover $228,294,283.54 by levy of an attachment upon gold, the property of Banque de France, deposited in the Federal Reserve Bank of New York, valued at seven hundred and forty-nine million dollars. Service of the summons in said action upon Banque de France was effected by publication.

Banque de France, appearing specially, moved to dismiss the complaint in said action on the ground, among others, that to subject Banque de France to the necessity of defending the action in the courts of the State of New York would impose upon the defendant, a foreign corporation engaged in interstate and foreign commerce, an undue and unreasonable burden, in violation of the Constitution of the United States, and particularly of Article 1, Section 8, Clause 3 thereof. The Supreme Court of the State of New York denied said motion on August 8th, 1941,

with an opinion by Mr. Justice Benvenga, in which he held that the immunity from suit of non-resident corporations engaged in interstate or foreign commerce does not apply to foreign banking corporations "at least not to foreign banking corporations which, like those here involved, are not commercial banks, but central banks of issue", and that even assuming that Banque de France is engaged in foreign commerce, the prosecution of the action in the courts of the State of New York would not impose upon it a burden so heavy and so unnecessary as to be oppressive and unreasonable within the meaning of the Constitutional provision.

Appellant appealed from the decision of Mr. Justice Benvenga to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, and the latter Court affirmed the order of the lower Court denying appellant's motion to dismiss the complaint. Appellant then applied to the said Appellate Division of the Supreme Court of the State of New York for permission to appeal to the Court of Appeals of the State of New York, which application was denied.

Banque de France has not answered, or appeared generally, in said action.

On November 3rd, 1941, appellant, following the procedure approved by this Court in *Denver & Rio Grande Western R. Co.* v. *Terte*, 284 U. S. 284, instituted this Special Proceeding in the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, for an Order of Restraint, pursuant to the provisions of Article 78 of the Civil Practice Act of the State of New York, and Sections 1295 and 1300 thereof, directing the Supreme Court of the State of New York and Hon. Felix C. Benvenga, individually and as one of the Justices of said Court, and Daniel de Gorter and Henri Wild, as

Assignees of Banque Nationale de Belgique, to desist and refrain from taking any further proceedings in the action hereinabove mentioned, and restraining the Supreme Court of the State of New York and Hon. Felix C. Benvenga, individually and as one of the Justices thereof, from entertaining or exercising jurisdiction in said action, upon the ground that the exercise of jurisdiction therein was without, or in excess of, the jurisdiction of said Supreme Court of the State of New York and said Hon. Felix C. Benvenga, as one of the Justices thereof, because of the provisions of Article 1, Section 8, Clause 3 of the Constitution of the United States.

On November 10th, 1941, the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, sustained a demurrer to the said petition and dismissed the petition "as matter of law and not in the exercise of discretion." Upon appeal to the Court of Appeals of the State of New York, the said Court being the highest Court in the State of New York, on March 5th, 1942, affirmed the decision of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, with an opinion by Hon. Irving Lehman, Chief Judge of said Court, wherein the said Court of Appeals of the State of New York unanimously held valid and constitutional the provisions of Section 224 of the General Corporation Law of the State of New York (Laws 1909, ch. 28, Section 224).

It is the aforesaid judgment of the Court of Appeals of the State of New York from which appellant seeks to appeal to the Supreme Court of the United States, and which the appellant contends that the Supreme Court of the United States has jurisdiction to review.

VII. The cases upon which appellant relies to sustain the jurisdiction of the Supreme Court of the United States

to review the said judgment of the Court of Appeals of the State of New York are the following: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Jett Bros. Co.* v. *City of Carrollton*, 252 U. S. 1.

The precise questions here presented have never been passed upon by the Supreme Court of the United States, as they are questions of first impression. Concededly, immunity from suit under the so-called "Commerce Clause" of the Constitution has heretofore been applied in litigations involving only corporate common carrier defendants. It is the contention of appellant, however, that such immunity applies equally to all engaged in interstate or foreign commerce, and that such immunity from suit in a jurisdiction foreign to the place of business of the corporate defendant and to the place where the cause of action arose in favor of a non-resident plaintiff, upon a contract made and to be performed in a foreign jurisdiction, is not confined to defendants who are engaged in transportation as common carriers. Appellant also contends that the nature of the function in interstate and foreign commerce performed by the corporate defendant is not the decisive factor in determining the existence of such immunity, but that such decisive factor is to be found in the fact that the corporate defendant is engaged exclusively in interstate or foreign commerce, and that, therefore, the defense of a suit against it in a foreign forum necessarily places an undue burden upon commerce.

From the opinion of the Court of Appeals in this case, it is not entirely clear that the refusal to apply the immunity in the case at bar is grounded upon the fact that the defendant, a foreign banking corporation, is not a common carrier engaged in the business of transportation of persons or things in interstate or foreign commerce.

In this regard the opinion of Chief Judge Lehman says:

> "At least in theory, state laws which unreasonably obstruct and unduly burden interstate commerce in any form may violate the commerce clause of the Constitution. (*Davis* v. *Farmers Cooperative Equity Co.*, 262 U. S. 312, 316). The principle upon which the petitioner relies is general; yet when that principle is invoked to support the contention that in a particular case a law of the State of New York is obnoxious to the commerce clause of the Constitution, then the nature of the function which the foreign corporation performs in foreign or interstate commerce may be the decisive factor in applying the test whether the assertion of jurisdiction casts 'a serious and unreasonable burden' upon the corporation, a burden which unduly obstructs interstate commerce."

The really determining factor against the granting of immunity in the case at bar, which seems to have been adopted in the decision of the Court of Appeals of the State of New York, is that in the litigation at bar the facts fail to prove that "the suit might more conveniently be litigated in another forum available equally to both parties."

Appellant respectfully submits that this is not the true test as laid down by the decisions of the Supreme Court of the United States in the cases hereinabove set forth, and that if the principle thus stated to be controlling by the Court of Appeals of the State of New York is to be accepted as such, it should be so established by an authoritative decision of the Supreme Court of the United States.

VIII. There is appended hereto a copy of the opinion delivered by Mr. Justice Benvenga, one of the Justices of the Supreme Court of the State of New York, to which this Special Proceeding is ancillary, entitled "Daniel de Gorter and Henri Wild, as Assignees of Banque Nationale

de Belgique, plaintiffs, against Banque de France, defendant", affirmed 262 A. D. 997.

There is also appended hereto a copy of the opinion herein delivered by Hon. Irving Lehman, Chief Judge of the Court of Appeals of the State of New York, dated March 5th 1942.

Respectfully submitted,

FREDERIC R. COUDERT,
Attorney for Appellant.

COUDERT BROTHERS,
Of Counsel.

Leave to file the foregoing statement as to jurisdiction is hereby granted this 24th day of March, 1942.

IRVING LEHMAN,
Chief Judge, Court of Appeals.